THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-13713
	)	
CHRISTINE P. MITCHELL,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

Prepetition, the Debtor Christine Mitchell established an individual retirement account (the "IRA"). When she filed her Chapter 7 bankruptcy case, she claimed the IRA as exempt from the bankruptcy estate under Bankruptcy Code § 522(b)(2) and Ohio Revised Code § 2329.66(A)(10)(c). (Docket 1). The Trustee objects to the exemption. (Docket 9). Historically, the Chapter 7 trustees in this district accepted similar exemptions as appropriate. Based on a recent unpublished Sixth Circuit decision, however, the trustees have lodged objections in numerous cases, including this one, arguing that the Employee Retirement Income Security Act of 1974 ("ERISA") preempts this exemption. For the reasons stated below, the Trustee's objection is overruled and the exemption is allowed.

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FACTS

The Debtor claimed her IRA as exempt property with a value of $14,695.00. The parties agree that the IRA comes within the terms of Ohio Revised Code § 2329.66(A)(10)(c). The

Debtor asserts without contradiction by the Chapter 7 Trustee that her IRA is not part of or administered by an employee benefit plan.

EXEMPTIONS AVAILABLE TO A DEBTOR FILING A CHAPTER 7 CASE IN OHIO

A Chapter 7 bankruptcy estate generally consists of all of the debtor's legal and equitable interests in property. *See* 11 U.S.C. § 541. As a matter of public policy, Congress has determined that the honest debtor may exempt, or keep, some property from the estate so that the debtor may start anew after obtaining bankruptcy relief. *See* 11 U.S.C. § 522. *See also Dettmann v. Brucher (In re Brucher)*, 243 F.3d 242, 243 (6th Cir. 2001). Bankruptcy Code § 522 specifies federal bankruptcy exemptions. 11 U.S.C. § 522(d). Alternatively, the Code permits a state to opt out of the federal exemptions. 11 U.S.C. § 522(b)(1). When a state opts out, a debtor filing in that state is limited to claiming exemptions allowed under state law and general non-bankruptcy federal law. 11 U.S.C. § 522(b)(2).

Ohio has opted out of the federal bankruptcy exemptions. *See* Ohio Rev. Code § 2329.662. This means that debtors who file their bankruptcy cases in Ohio choose their exempted property by reference to state law. The state law at issue here is Ohio Revised Code § 2329.66(A)(10)(c). Under that statute, a debtor may hold exempt from her creditors her "right in the assets held in, or to receive any payment under, any individual retirement account," subject to limitations that are not in dispute.[1] Ohio Rev. Code § 2329.66(A)(10)(c).

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[1] Ohio Revised Code § 2329.66(A)(10)(c) provides in relevant part that a debtor may exempt from execution, attachment, garnishment or sale to satisfy a judgment or order:

> (c) . . . the person's right in the assets held in, or to receive any payment under, any individual retirement account, individual retirement annuity, "Roth IRA," or education individual retirement account that provides benefits by reason of illness, disability, death, or age, to the extent that the assets, payments, or benefits described in division (A)(10)(c) of this section are attributable to any of the following:

ISSUE

The issue is whether the Debtor may exempt her IRA account from the bankruptcy estate under Bankruptcy Code § 522(b)(2) and Ohio Revised Code § 2329.66(A)(10)(c).

THE POSITIONS OF THE PARTIES

The parties agree that the funds held in the IRA are part of the bankruptcy estate unless the Debtor may exempt them. The Trustee contends that the Debtor may not claim the IRA as exempt property because the Ohio statute which creates the exemption has been preempted by ERISA § 1144(a). That statute states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA, with exceptions not relevant here. 29 U.S.C. § 1144(a). If ERISA supersedes Ohio Revised Code § 2329.66(A)(10)(c), a debtor filing a Chapter 7 bankruptcy case in Ohio may not rely on the Ohio statute to retain her interest in an individual retirement account. Instead, the Trustee argues, those funds are properly turned over for administration and distribution to creditors.

> (i) Contributions of the person that were less than or equal to the applicable limits on deductible contributions to an individual retirement account or individual retirement annuity in the year that the contributions were made, whether or not the person was eligible to deduct the contributions on the person's federal tax return for the year in which the contributions were made;
>
> (ii) Contributions of the person that were less than or equal to the applicable limits on contributions to a Roth IRA or education individual retirement account in the year that the contributions were made;
>
> (iii) Contributions of the person that are within the applicable limits on rollover contributions under subsections 219, 402(c), 403(a)(4), 403(b)(8), 408(b), 408(d)(3), 408A(c)(3)(B), 408A(d)(3), and 530(d)(5) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended.

Ohio Rev. Code § 2329.66(A)(10)(c).

The Debtor makes two arguments in opposition. First, she contends that ERISA preemption does not apply at all. Her theory is that, by definition, ERISA only supersedes state laws that relate to employee benefit plans and the individual retirement accounts addressed in Ohio Revised Code § 2329.66(A)(10)(c) are not employee benefit plans. Alternatively, the Debtor argues that if the Ohio statute does relate to employee benefit plans, she is still entitled to her exemption because the ERISA savings clause preserves her exemption rights under federal bankruptcy law. The savings clause provides that preemption "shall not be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). The Debtor posits that it would be illogical and contrary to federal bankruptcy law to prevent a debtor filing in Ohio from exempting an individual retirement account when the Bankruptcy Code specifically permits a state to allow such an exemption.

DISCUSSION

I.

"ERISA is a comprehensive act designed to regulate employee welfare and pension benefit plans . . . [and] [t]o assure that the regulation of [these plans] would remain an area of exclusive federal concern, Congress passed . . . the preemption provision." *Kentucky Assoc. of Health Plans, Inc. v. Nichols*, 227 F.3d 352, 357 (6th Cir. 2000), *cert. granted*, 122 S.Ct. 2657 (2002). The preemption provision is found in 29 U.S.C. § 1144(a). That section preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title . . .". 29 U.S.C. § 1144(a). A state law relates to "a covered employee benefit plan . . . 'if it [1] has a connection with or [2] reference to such a plan.'" *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519

U.S. 316, 324 (1997) (quoting *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992)). A state law refers to an ERISA plan if: (1) it acts immediately and exclusively upon ERISA plans and singles them out for different treatment; or (2) the existence of ERISA is essential to the law's operation. *See Kentucky Ass'n of Health Plans, Inc.*, 227 F.3d at 358-61. A state law has a connection with an ERISA plan if the law mandates employee benefit structures or their administration. *Id.* at 361-63.

II.

The dispositive question under the facts of this case is whether an individual retirement account such as the Debtor's IRA comes within ERISA's definition of an "employee benefit plan." *See* 29 U.S.C. § 1144(a) (preempting state laws that "relate to any employee benefit plan described in section 1003(a)"). An employee benefit plan under § 1003(a) is a plan which is established or maintained by employers, employee organizations, or both. *See* 29 U.S.C. § 1003(a). *See also*, 29 U.S.C. § 1002(3) (defining "employee benefit plan" to include employee pension benefit plans, employee welfare benefit plans, and plans that are both). The Debtor states that her IRA is not part of or administered by an employee benefit plan and that the Ohio law exempting it from the reach of her creditors does not, therefore, relate to an employee benefit plan. The Trustee has not directly responded to that argument.[2] If Ohio Revised Code § 2329.66(A)(10)(c) exempts the Debtor's IRA and does not relate to an employee benefit plan,

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[2] The Trustees asserts that "the type of IRA for which exemption is sought is related to ERISA" and "subject to attachment", but skips over the issue of whether an individual retirement account is an employee benefit plan. *See* objection at ¶¶ 4, 5. (Docket 9). He argues with little amplification that "[s]ection 2329.66(A)(10)(c) of the Ohio Revised Code is so 'connected with' ERISA that it is pre-empted by the provisions of 29 U.S.C. Section 1144(a)." *See* Trustee's Brief in support of objection at 4. (Docket 15). The Trustee is not alone in this limited reasoning, as the objections filed by other trustees do not shed much more light on the argument being made in support of the position.

then the state law protecting the funds is not superseded by ERISA. There is no Sixth Circuit law directly on point.[3]

Individual retirement accounts of the type at issue are established under Internal Revenue Code 26 U.S.C. § 408(a). As one court noted, Ohio's individual retirement account exemption is "geared toward retirement accounts established by individuals" rather than employer sponsored pension plans. *In re Schreiner*, 255 B.R. 545, 548 (Bankr. S.D. Ohio 2000). These are self settled retirement accounts that are not maintained by an employer or an employee organization. As a result, they are not employee benefit plans within the reach of ERISA. *See, for example, Reliance Ins. Co. v. Zeigler*, 938 F.2d 781 (7th Cir. 1991); *LeBarge v. Mehra (In re Mehra),* 166 B.R. 393 (Bankr. E.D. Mo. 1994); *In re Herrscher*, 121 B.R. 29 (Bankr. D. Ariz. 1989); *In re Martin*, 102 B.R. 639, 643-44 (Bankr. E.D. Tenn. 1989). Given that individual retirement accounts like the Debtor's fall outside of ERISA's scope, ERISA does not preempt the state law, the Debtor is entitled to exempt her IRA under Ohio Revised Code § 2329.66(A)(10)(c), and the Trustee's objection to her exemption is overruled.

In light of this ruling, it is not necessary to decide whether the ERISA savings clause, 29 U.S.C. § 1144(d), applies.[4]

III.

In arguing that the exemption should be disallowed, the Trustee relies on the Sixth Circuit's unpublished decision in *Lampkins v. Golden*, 28 FED App. 409, 2002 WL 74449 (6th

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[3] The Sixth Circuit has, however, held that a debtor filing in Michigan may claim an individual retirement account as exempt under the federal exemptions. 11 U.S.C. § 522(d)(10)(E). *Dettmann v. Brucher (In re Brucher)*, 243 F.3d 242 (6th Cir. 2001).

[4] This is particularly appropriate because the Trustee did not brief that issue.

Cir. 2002). While unpublished decisions are not binding precedent, they may be persuasive in the absence of controlling authority. *See* CTA6 Rule 28(g). *See also Booth v. Vaughn (In re Booth)*, 260 B.R. 281, 287 (B.A.P. 6th Cir. 2001) (collecting cases). The Court, therefore, considers *Lampkins* with an eye toward whether it supports the Trustee's position and suggests that the exemption should be disallowed.

In *Lampkins,* a woman employed in Michigan won judgments against her employer based on claims that the employer-lawyer violated various ERISA provisions, including ones that imposed fiduciary responsibilities on him. Although the employer continued to practice law, he refused to pay the judgments claiming that he had no assets or income. The employee then discovered that while the employer was pleading poverty, he had transferred significant assets into a Simplified Employee Pension ("SEP") individual retirement account. Michigan law protected SEPs from garnishment. Nevertheless, the employee attempted to garnish the SEP to collect her judgment. The basic issue was whether the funds held in the SEP were exempt from garnishment under ERISA and/or state law. The Sixth Circuit held that the SEP fell under Internal Revenue Code 26 U.S.C. § 408(k), that it was exempt from ERISA's anti-alienation provisions (meaning that it could be garnished under ERISA), and that the Michigan law that protected such accounts from garnishment was preempted by ERISA. As a result, the employee was permitted to garnish the account to satisfy her judgments.

The Trustee has not identified any specific way in which *Lampkins* is directly relevant to this case and the Court finds that it does not recommend any particular result here because it is both factually and legally distinguishable. First, the employer-judgment debtor's account in *Lampkins* was a § 408(k) simplified employee pension rather than a § 408(a) individual retirement account. *See* 26 U.S.C. § 408(a) and (k). The significant difference between these

two types of accounts (for purposes of this decision) is that a simplified employee pension is an employer-sponsored plan while an individual retirement account is not. *See In re Schreiner,* 255 B.R. at 549 ("The SEP is an employer-sponsored plan that allows the employee to contribute more than the limits imposed on contributions to individual retirement accounts and annuities."). Second, *Lampkins* was not a bankruptcy case. This means that of necessity the decision did not discuss the important interaction between Bankruptcy Code § 522 and Ohio's exemption statute or the impact of the ERISA savings clause on the federal bankruptcy law. The *Lampkins* decision does not, therefore, suggest that individual retirement accounts such as the Debtor's IRA are employee benefit plans within the meaning of ERISA or that Ohio Revised Code § 2329.66(A)(10)(c) is preempted by ERISA when it serves as the basis for a debtor's bankruptcy exemptions.

CONCLUSION

For the reasons stated, the Trustee's objection is overruled and the Debtor's exemption is allowed. A separate order will be entered reflecting this decision.

Date: 31 October 02

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Debra Booher, Esq.
Stephen Hobt, Esq.

By: Joyce L Gordon, Secretary

Date: 10/31/02

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CHRISTINE P. MITCHELL,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the Memorandum of Opinion filed this same date, the Trustee's Objection to Exemption is overruled. (Docket 9).

IT IS SO ORDERED.

Date: 31 Oct 02

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Stephen Hobt, Esq.
Debra Booher, Esq.

By: Joyce L. Gordon, Secretary

Date: 10/31/02